Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

CROW TRIBE OF INDIANS,

Petitioner,

v.

CAMPBELL FARMING CORPORATION; ROBERT EARL HOLDING; SINCLAIR OIL CORPORATION, d/b/a SUNLIGHT RANCH COMPANY; SUN VALLEY COMPANY, AND KMH RANCH COMPANY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether summary reversal is appropriate where the court of appeals affirmed the dismissal of an action based on a ground which was not addressed or mentioned in the district court's opinion, was not presented as an issue to the court of appeals, and no opportunity was provided for the parties to brief or argue the issue on which the decision was based.

2. Whether the Crow Tribe has a right of action to enforce section 2 of the Crow Allotment Act of 1920, 41 Stat. 751, which protected Crow tribal members by prohibiting conveyances of land within the Crow Reservation to persons who own more than specified amounts of reservation land.

LIST OF PARTIES

The principal parties to this case appear in the caption. In addition, the 162 individuals and entities listed in footnote 1 who own, or claim to own, land within the Crow Indian Reservation, were allowed to intervene.[1]

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[1] A.G. Ballensky Co., a Montana corporation; Gary R. Ballensky; Agri-West Inc., a Montana corporation; Joe Bassett; Matthew Bassett; Becker Land & Livestock, Inc., a Montana corporation; Gary B. and Vicki K. Bishop; Blue Creek Farms, Inc.; P.L. Boyd; William L. and Patricia A. Breen; J. Loren and Janet R. Brooks; Harriet C. and Murry J. Brown; Peter Campot; Centaur Capitol Corp., a Montana corporation; CH Land & Cattle Co., a Montana corporation; William R. and Doris M. Crawford; Cross A Ranch, Inc., a Montana corporation; Marie Bainter Crum; William V. Daum; Sam E. Denny; Glenn Lee and Rhonda Elhard; Leo M. and Betty Elhard; LeRoy Enzminger; Henry L. and Donna M. Esp; Faddis Kennedy Cattle Co., a Montana corporation; Linda C. Fenter; First Continental Corporation, a Montana corporation; Flying V Cattle Company, a Wyoming corporation; John Elisha Fowler; Charles F. Fuller; Kathy Jo Genatone; Patrick K. and Florence M. Goggins; C. Allen Graham; Gary Joe and June I. Graham; Nelle Yvette Graham; Susan Graham; Greenwalt Farms, Inc., a Montana corporation; Hamilton Ranch, Inc., a Montana corporation; George J. and Jo Annette Hammond; Charles E. Helvey; Norma L. Henderson; H. Burton Hoffman; Eric Daniel Hope; Gary David and Nona Eileen Hope; Joe E. and Barbara Hope; Joseph Albert Hope; Shane Samuel Hope; G. Irwin Hults; Ralph M. Hults; Hale C. and Terry E. Jeffers; Torrey B. Johnson; Jones Bros. Livestock Co., a Montana corporation; Knowles Land Co., a Montana corporation; Joe V. Koebbe; Lawrence Koebbe; Robert L. and Jean Kukes; Dick R. Kukowski; Jack Kukowski; Ray Kukowski; Steve and Linda Kukowski; Lackman Farming Corp.; Charles Lee; Jay Lee; Helen Lee; Peter Manigault; Edythe Turley McCleary Trust; Bowman Merritt; Carter and Helene R. Miklovich; Pete and Kara Jean Miklovich; Paul Miller; Wade and

LIST OF PARTIES – Continued

The United States filed a brief and argued as amicus curiae before the Court of Appeals.

Joan Miller; William Lee Miller; Millers Owl Creek Ranch, Inc., a Montana corporation; Willard I. Moehr; Montaylor Corp., a Montana corporation; Casey Munter; Leonard F. and Inger Munter; Allene Murdock; Judith Ann Murdock; Lyle M. Neal; Nicholson Ranch; Padlock Ranch Company, a Wyoming corporation; Pearlie Lee & Co.; Joe and Pauline Peters; Harold E. Pilkington; Harvey Pitsch; Irvin Pitsch; Ronald G. and Patricia B. Pitsch; Ella Jane Porter; Darrell and Mary Rathkamp; Paul R. Roberts; Herta G. Schaak; LeeRoy Schoneman; Dan S. Scott; Scott Land & Livestock Co., a joint venture; Robert G. Shaw; Mary Slattery; Howard W. and Shirley R. Snively; Soap Creek Cattle Co., a Montana corporation; Spear O Ranch Company, a Montana corporation; Byron Stimpson; Stimpson Bros. Ranch Inc.; Roy C. and Nancy M. Streets; Ward and Judy Swanser; Robert E. Swift; William B. Swift; T.T. Ranch, Inc., a Montana corporation; Lila V. and Walter J. Taylor, Jr.; Max E. and Katherine L. Thorton; Margaret Miller Torske; Torske Cattle Co.; Torske Land & Livestock; Lynn N. Torske; Nils E. & Lois N. Torske; Lyle B. and Jocelyn J. Tyler; Wayne Uffelman; Uffelman Farms, Inc., a Montana corporation; William and Helen Uffelman; Vale Creek Ranch, a Montana corporation; Eugene Veenhuis; John E. Walborn; Walborn Cattle Co.; Ronald Wald; Dennis K. Warren; Harvey and Charlene Warren; Floyd Warren, Inc., a Montana corporation; David & Beverly Watson; Walter Willett; and Larry C. Wilson.

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Petitioner Crow Tribe of Indians respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 20, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 31 F.3d 768 (9th Cir. 1994) and is reproduced as Appendix

(App.) A at 1-10. The order denying the petition for rehearing filed by the Crow Tribe is reproduced as App. C (at 35). The opinion of the District Court is reported at 828 F. Supp. 1468 (D. Mont. 1992) and is reproduced as App. B (at 11-34).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 20, 1994. The Crow Tribe's petition for rehearing was denied on October 28, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 of the 1920 Crow Allotment Act, 41 Stat. 751, provides as follows:

> No conveyance of land by any Crow Indian shall be authorized or approved by the Secretary of the Interior to any person, company, or corporation who owns at least six hundred and forty acres of agricultural or one thousand two hundred and eighty acres of grazing land within the present boundaries of the Crow Indian Reservation, nor to any person who, with the land to be acquired by such conveyance, would become the owner of more than one thousand two hundred and eighty acres of agricultural or one thousand nine hundred and twenty acres of grazing land within said reservation. Any conveyance by any such Indian made either directly

or indirectly to any such person, company, or corporation of any land within said reservation as the same now exists, whether held by trust patent or by patent in fee shall be void and the grantee accepting the same shall be guilty of a misdemeanor and be punished by a fine of not more than $5,000 or imprisonment not more than six months or by both such fine and imprisonment.

The classification of the lands of such reservation for the purpose of allotment and the allotment thereof shall be made as provided in the Act of Congress approved June 25, 1910, which classification with any heretofore made by authority of law as to lands heretofore allotted shall be conclusive, for the purposes of this section, as to the character of the land involved.[2]

STATEMENT OF THE CASE

This action was filed by the Crow Tribe (Tribe) against several defendants who, the Tribe alleged, own (or claim to own) land within the Crow Reservation in violation of the acreage limits prescribed by section 2 of the 1920 Crow Allotment Act. Jurisdiction is premised on 28 U.S.C. §§ 1331 (federal question) and 1362 (suit by Indian tribe raising federal question).

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[2] Section 2 was amended by Act of June 8, 1940, 54 Stat. 252. The 1940 amendment added a proviso to the first paragraph of section 2 which authorized the Secretary of the Interior to approve sales or exchanges of reservation lands to Crow tribal members without regard to the acreage restrictions.

The Crow Allotment Act of 1920 provided generally for the allotment of land on the Crow Reservation in Montana to members of the Crow Tribe. 41 Stat. 751. In addition to allotting land to tribal members, the Act reserved certain land and resources on the Reservation in common for the benefit of the Tribe (sections 5, 6, 10), required individual Crow Indians to designate a 640-acre homestead, only portions of which could be sold (section 13) and appropriated funds for tribal business (section 7).

Section 2 limits the amount of land non-Crow Indians may acquire within the Crow Reservation to no more than 1,280 acres of agricultural land or 1,920 acres of grazing land. It provides that conveyances made in violation of those restrictions "shall be void" and that the purchasers of excess acreage "shall be guilty of a misdemeanor." In its complaint, the Tribe contended that the defendants' allegedly unlawful ownership of Crow Reservation lands acquired in violation of section 2 harmed the agricultural and grazing economy within the Crow Reservation, prevented the Tribe and its members from enjoying the use of lands within the Reservation and dispossessed the Tribe and its members from lands within the Reservation, thereby causing the Tribe to be deprived of the use of such lands. ER 11.[3]

According to a 1986 Audit Report of the Interior Department's Inspector General, which was attached to and incorporated in the Tribe's complaint, violations of section 2 began in the 1940s and continued to the time of

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[3] ER refers to the Excerpts of Record filed with the court of appeals.

the report. ER 15. From 1946 to 1955, the Bureau of Indian Affairs sold more than 110,000 acres of Reservation land through supervised sales without any attempt to comply with section 2's acreage limitations. Although the precise amount of land held by section 2 violators is unknown, "all indications are that the violations have been numerous and substantial." *Ibid.*[4]

The 1986 Audit Report also states that the Interior and Justice Departments have considered bringing an action to enforce section 2 but have not done so even though "no one ever questioned the merits of the case." ER 16. "The main reason for the delays between 1976 and 1981 was that, every time a new political appointee was selected to manage either of the respective departments, the case would be sent back to the other department to determine whether departmental policy regarding the case remained the same." *Ibid.* Interior's Inspector General recommended that the Interior and Justice Departments initiate a test case to enforce section 2, but no such action has been filed by the federal government.

The defendants moved to dismiss, contending, *inter alia*, that the Tribe lacked standing to bring an action under section 2. Defendant Campbell Farming Corporation also claimed that Montana's five-year statute of limitations barred the Tribe's action against it.

The District Court held that the Tribe lacked standing to bring an action under section 2 and that the Tribe's

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[4] The Tribe's complaint alleges that defendant Campbell owns more than 45,000 acres and that defendant Holding and the corporations he controls own about 140,000 acres. ER 6, 7.

complaint therefore must be dismissed for lack of jurisdiction with respect to all defendants. App. 27-34. It concluded that the Tribe had failed to satisfy the "injury in fact" requirement for constitutional standing, terming the Tribe's allegations mere "abstract contention[s] of harm," "generalized assertion[s] of policy considerations behind [section] 2," and "speculative inference[s] of the effects of landowners owning large amounts of land." In any event, the District Court ruled, the Tribe could show neither the necessary causal relationship between its alleged injuries and the defendants' purchase of lands in excess of section 2's limits, nor any substantial likelihood that its alleged injuries would be redressed by a decision in its favor.

The District Court also granted summary judgment to Campbell Farming Corporation based on Montana's statute of limitation. App. 19-27. Although the Court acknowledged that state statutes of limitations may be applied to federal claims only in limited circumstances, it concluded that the state statute applied by virtue of section 6 of the General Allotment Act, 25 U.S.C. § 349,[5] as construed in *Dillon v. Antler Land Co.*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975). Among other things, the Court rejected the Tribe's arguments that section 6 does not subject the Tribe, as opposed to individual tribal members, to state law, that the Tribe's claim is governed by the federal statute of limitation, 28 U.S.C. § 2415, as construed in *County of Oneida v. Oneida Indian*

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[5] Section 6 provides that "each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside."

Nation, 470 U.S. 226 (1985), and that the Supreme Court's subsequent decisions in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1975), and *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, ___ U.S. ___, 112 S. Ct. 683 (1992), significantly limit or undermine the holding of *Dillon* and severely circumscribe the application of state law to Indians pursuant to section 6.[6]

On appeal, the Ninth Circuit affirmed the dismissal but not on the grounds of lack of standing or the running of the state statute of limitations. Rather, the Court of Appeals held that the Tribe does not have a cause of action under section 2. This issue had not been presented by any party or by the United States as amicus curiae.[7]

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[6] Standing alone, the District Court's disposition of the statute of limitations defense presented solely by Campbell Farming Corporation would not have been appealable because it did not dispose of all of the Tribe's claims with respect to all parties or even all of the claims against Campbell. See App. 19 & 27 n.19.

[7] The "Issues Presented" in the Tribe's Brief to the Ninth Circuit were stated as follows:

> 1. Whether the Crow Tribe has standing to bring an action to enforce a federal law limiting the amount of land non-Crow Indians may acquire within the Crow Indian Reservation.
>
> 2. Whether the state statute of limitations applies to an action brought by the Crow Tribe to enforce a federal law limiting the amount of land non-Crow Indians may acquire within the Crow Indian Reservation.

The defendants' "Statement of Issues Presented for Review" was as follows:

> 1. Did the District Court properly dismiss the Tribe's complaint for lack of standing where the Tribe satisfies none of the Article III requirements for

Applying only the first two of the four factors identified in *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Court of Appeals concluded that section 2 was enacted for the benefit of Crow tribal members, but not for the Tribe, and that Congress intended only individual Crow Indians to have a right of action. App. 6-7. The Court therefore found it unnecessary "to address the questions whether the Tribe lacks traditional standing or whether the state statute of limitations bars the Tribe's claim." App. 10.

The Tribe sought rehearing and requested that the Court of Appeals withdraw its opinion and judgment and either remand the case to the District Court for consideration of the question of whether the Tribe has a right of action to enforce section 2 or invite the parties to submit

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standing, where the Tribe admittedly has no ownership interest in the lands that are the subject of the Tribe's complaint, and where Section 2 of the Crow Allotment Act of 1920 was not enacted for the benefit of the Tribe?

2. Did the District Court properly grant summary judgment to CFC based on the court's determination that even if the Tribe has standing, its claims are nevertheless barred by the Montana statute of limitations made applicable by federal law to the lands here involved?

The "Issues Presented" by the United States as amicus curiae were stated as follows:

1. Whether the Crow Tribe has standing to bring an action under Section 2 of the Crow Allotment Act, 41 Stat. 751 (1920).

2. Whether the Montana statute of limitations applies to an action brought by the Crow Tribe under Section 2 of the Crow Allotment Act.

supplemental briefs addressing that issue. The petition for rehearing was denied without comment. App. 35.

REASONS FOR GRANTING THE WRIT

1. Summary Reversal Is Appropriate To Provide The Tribe A Full, Fair, And Meaningful Opportunity To Be Heard.

Whether the Tribe has a right of action to enforce section 2 was not addressed by the District Court and was not an issue presented for review to the Court of Appeals by any party or by the United States as amicus curiae. *See* n.7 *supra*.[8] Nor was it the subject of oral argument.

The Tribe does not challenge the jurisdiction or authority of appellate courts to affirm lower court judgments based on any ground supported by the record. *See* App. 4 n.1. It does, however, question the propriety, as well as the fairness, of deciding dispositive issues without providing the parties a full, fair and meaningful opportunity to be heard. It is one thing for a court to affirm on a ground not addressed by the lower court. It is quite another to do so unilaterally, without

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[8] Under the heading "The Tribe Cannot Establish Its Own Standing By Simply Alleging A Violation Of Section 2," the defendants devoted approximately 1½ pages of their 47 page appellate brief to a discussion of the factors for determining whether a private cause of action to enforce a statute exists. The Tribe responded with a comparable 1½ page argument in its 25 page *reply* brief. The issue was not mentioned in the Tribe's 50 page opening brief, the government's 24 page amicus brief, or the defendants' 20 page response to the government's amicus brief.

providing the parties a full, fair and meaningful opportunity to be heard. The latter course undermines our adversary system of justice as well as the rules of practice and procedure which are designed to insure procedural due process and informed decision-making by our Nation's courts.

All governmental entities, most especially the courts, must provide interested parties the opportunity to present their case effectively, with procedures designed to minimize the risks of erroneous decisions. *Landon v. Plasencia*, 459 U.S. 21, 36-37 & n.9 (1982). The opportunity to be heard must be provided at a meaningful time and in a meaningful manner. *Barry v. Barchi*, 443 U.S. 55, 66 (1979). Though there are situations when federal appellate courts are justified in resolving issues not passed on below,[9] "injustice [is] more likely to be caused than avoided by deciding the issue without [a litigant] having had an opportunity to be heard." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). Thus, for example, in *Landon v. Plasencia*, 459 U.S. at 36-37 & n.9, this Court declined to decide issues which had not been adequately discussed by the parties. *See also, Montana v. Hall*, 481 U.S. 400, 410 (1987) (Marshall, J. dissenting) (when courts contemplate a summary disposition on an issue that has not been briefed on the merits, the parties should be invited to file supplemental briefs to accommodate the reasonable expectations of litigants and the integrity of the judicial system and to

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[9] Clearly, this is not a case "where the proper resolution is beyond any doubt" or "injustice might otherwise result." Singleton v. Wulff, 428 U.S. at 121. See *infra* at 12-22.

achieve the fairness and accuracy that the Nation rightfully expects from its courts); *Board of Educ. of Rogers, Ark. v. McCluskey*, 458 U.S. 966, 972 (1982) (Stevens, J. dissenting) ("The threat to the quality of our work that is presented by the ever-increasing impersonalization and bureaucratization of the federal judicial system is far more serious than is generally recognized"); and *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 271-272 (1982) (Blackmun, J. dissenting) (deciding a case on the basis of issues not raised or briefed "demeans the Court and its work . . . [,] surely tends to lessen the quality of its legal product . . . [and] deprives respondents of their 'day in court' in a singularly inappropriate manner").

The petition for certiorari should be granted and this case summarily remanded to the Court of Appeals with instructions either to remand to the District Court for consideration of the question whether the Tribe may sue to enforce section 2 or to provide the parties an opportunity to file supplemental briefs addressing that issue. By so doing, this Court would send a clear message to the lower federal courts, especially the appellate courts (which are the courts of last resort in virtually all federal court cases), that they should not decide cases on the basis of issues which the litigants have not had a full, fair and meaningful opportunity to address.

2. The Decision Below Does Not Consider And Conflicts With Decisions Of This Court Regarding The Relationship Between An Indian Tribe And Its Members, The Meaning Of "Void" As Used In Federal Statutes, And The Right Of Indian Tribes To Be Treated Like The United States.

a. The Court of Appeals acknowledged that section 2 of the Crow Allotment Act "was enacted for the benefit of a group of individuals, each of whom is a member of the [Crow] Tribe . . . " App. 6. In this regard, it is significant that the intended beneficiaries of section 2 were not any Indians, but only those belonging to, and living within the territory of, the Crow Tribe. It also recognized that the purpose of section 2 was to protect all tribal members who own land within the Crow Reservation, not just those who sell to ineligible purchasers. App. 7-9. Nevertheless, it proceeded to make a sharp and rigid distinction between the Tribe and its members, as if they are entirely separate, without citing any law and overlooking the controlling decisions of this Court.

At first blush, it would appear that a statute enacted for the benefit of Crow tribal members also would benefit, and would be intended to benefit, the Crow Tribe. After all, a tribe is a "group" or "body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya v. United States*, 180 U.S. 261, 266 (1901); Felix S. Cohen, *Handbook of Federal Indian Law* 3, 12 (1982 ed.). It would defy ordinary language as well as common sense, for example, to argue that a statute designed to benefit the residents of a particular area, say earthquake victims in Los Angeles,

was *not* also intended to benefit the City or County of Los Angeles, or that a treaty or statute enacted for the benefit of a tribe was *not* also intended to benefit the members of the tribe. In the absence of any indication of an adversity of interest between a community and its residents or a tribe and its members,[10] one would naturally and ordinarily believe that a law enacted to benefit one also would be intended to benefit the other. It is therefore not at all surprising that Congress did not expressly consider the rights and interests of the Tribe under section 2 as separate and distinct from those of its members, especially since section 2 does not directly implicate the Tribe's governmental interests.

This Court has rejected efforts to draw a rigid distinction between a tribe and its members and applied the common sense view that a tribe and its members are inextricably intertwined. In *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977), the State of Washington sued 41 members of the Puyallup Tribe claiming that they were fishing in violation of state law. The Tribe filed an answer which, this Court noted, "used the term 'tribe' in

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[10] Cf. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978) (noting the "two distinct and competing purposes" of the Indian Civil Rights Act, strengthening the position of individual tribal members vis-a-vis the tribe and furthering Indian self-government); Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976) (suit between a tribe and its members regarding title to minerals underlying allotted Indian lands); Barany v. Buller, 670 F.2d 726 (7th Cir. 1982) (interests of two classes were different and in conflict, such that membership in both classes precluded right of action available to only one of them).

two senses, first as a collective synonym for the individual defendant-members, and also as referring to a sovereign Indian nation." 433 U.S. at 168-169. The Tribe continued to participate in the lengthy litigation "in the dual capacity of a sovereign entity and as a representative of its members who were individual defendants," 433 U.S. at 169-170, and this Court held that the Tribe properly represented and stood in judgment for its members, 433 U.S. at 173.

Thus, in *Puyallup* the Supreme Court acknowledged that the terms "Indian tribes" and "tribal members" are often and properly used synonymously and interchangeably. A reference to the members of a tribe ordinarily and necessarily encompasses the tribe and vice-versa. The Court of Appeals ignored the teachings of this Court in drawing a sharp and rigid distinction between the Crow Tribe and its members, and in finding that Congress intended to benefit the tribal members but not the Tribe.

Moreover, under *Puyallup*, the Crow Tribe is appropriately representing the interests of its members who, the lower court held, were the especial and intended beneficiaries of section 2. Similarly, in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 468 n.7 (1976), this Court held that a tribe properly represented its members in a suit challenging the validity of state taxes imposed on and paid by its members.

This Court should grant review to consider the relationship between the Tribe and its members in the context of a statute which protects the interests of tribal members

against third parties in light of *Puyallup*, *Moe* and *Montoya*.

b. The primary basis for the lower court's conclusion that the Tribe does not have a cause of action to enforce section 2 was the provision invalidating conveyances of land to ineligible purchasers. App. 6-7. It reasoned that void conveyances necessarily result in title remaining in the would-be sellers and therefore individual Indians alone, not the Tribe, would benefit from enforcement of the statute.

Here too the Court of Appeals rushed to judgment without benefit of briefing and in the process overlooked this Court's controlling precedents. In so doing, that Court improperly prejudged the ultimate issue of the appropriate remedy (or remedies) at a very preliminary stage of the litigation.

The use of the word "void" in a statute does not always or necessarily mean that the transaction must be regarded as a nullity. Rather, "void" sometimes means "voidable." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 386-389 (1970); *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301, 311 (1935) ("void" in the context presented "is the equivalent of voidable"). As stated in *Ewell v. Daggs*, 108 U.S. 143, 148-149 (1883):

> But these words ["void and of no effect"] are often used in statutes and legal documents . . . in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances.

In fashioning an appropriate remedy for transactions declared void by statute, courts must strive "to make effective the congressional purpose," while also "keeping in mind the role of equity as 'the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' " *Mills v. Electric Auto-Lite Co.*, 396 U.S. at 386, citations omitted.

Contrary to the lower court's apparent assumption, the remedy issue under section 2 is difficult and complex; it is not a simple matter determined automatically, insensitively, thoughtlessly and mechanically. There is a broad array of potential remedies which could be fashioned to redress violations of section 2, including an order directing the violators to divest themselves of their excess land holdings, with or without compensation. *See, e.g., Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S.Ct. 1028 (1992) (" 'Where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done' ").

The Tribe, as the representative of its members and as the governing body of the Crow Reservation, has an enormous stake in protecting individual Crow Indians as well as the character of the Crow Reservation. It is therefore the most appropriate and logical plaintiff. *See, e.g., Arizona v. California*, 460 U.S. 605, 615 (1983) (federal policy encourages the participation of tribes in litigation critical to their welfare). In any event, the teaching of this Court is that the use of the word "void" in a statute should not be construed in an inflexible manner at a

preliminary stage of litigation so as to determine conclusively the parties who may or may not have a right to sue.

Further, the Court of Appeals clearly erred in assuming that only tribal members who sell to ineligible purchasers would stand to benefit from suits to enforce section 2 by retaining title to the land they illegally conveyed. Under the positions of both the Tribe and the defendants regarding the purpose of section 2, the utilization of Reservation land by farmers and ranchers who do not own more than 1,280 acres of agricultural land or 1,920 acres of grazing land would benefit all tribal members and especially those who remain on the Reservation and earn their living from their land. These tribal members would benefit by not being subjected to pressures to sell their land to large landowners or speculators and by being able to maintain their own small farming and ranching operations rather than being transformed into "mere sharecroppers." *See* App. 7-9.

Thus, even if the Court of Appeals turns out to be correct in assuming that the sole remedy for section 2 violations is returning the illegally conveyed land to the persons who sold it to ineligible buyers, it would not follow that Congress intended that only those sellers should have a right of action. Indeed, by not analyzing the third *Cort v. Ash* factor,[11] whether a right of action in

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[11] See App. 4-5. In conflict with its decision below, in Harper v. Federal Land Bank of Spokane, 878 F.2d 1172, 1174 (9th Cir. 1989), and In re Washington Public Power Supply System Securities Litigation, 823 F.2d 1349, 1354 (9th Cir. 1987) (en banc), the Ninth Circuit held that the second and third factors

the Tribe would further the purpose of section 2, the lower court failed to recognize that limiting the remedy to Crow tribal members who sell their land to ineligible purchasers would undermine section 2. The true beneficiaries of the acreage limitation, those tribal members who remain on the Reservation and live and work on their small farms and ranches, would be left without a remedy, at the mercy of the non-Indians who acquire large landholdings from tribal members who sell their land, leave the Reservation and do not file suit to invalidate the conveyances.[12]

The Court of Appeals correctly recognized that Congress clearly intended to provide a civil remedy to redress violations of section 2. App. 6; *see also, Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 18 (1979) (statute declaring certain contracts void necessarily meant that the issue of voidness would be litigated). By taking the inquiry an additional step and concluding that

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are the most important in determining whether a cause of action should be implied. The fourth Cort v. Ash factor also supports a federal right of action in the Tribe because the Tribe's suit arises under federal law and the field of federal Indian law is not traditionally governed by state law.

[12] To tribal members who sell their land, it makes no difference whether the purchaser is eligible or ineligible under section 2; their economic interest presumably is in obtaining the highest price. A suit to invalidate the conveyance ultimately could result in sellers receiving a lower price from eligible purchasers than they were able to obtain from large landowners with excess acreage. They also might be required to return a part or all of the consideration they already received and perhaps spent. These sellers would have little or no interest in bringing suit to invalidate conveyances made void by section 2.

only Crow tribal members, not the Tribe itself, could sue, the lower court ignored and violated the teachings of this Court concerning the construction of the word "void" in federal statutes, improperly prejudged the ultimate issue concerning the appropriate remedy and wound up by entrusting the enforcement of the statute to those who may have little to gain and much to lose by bringing suit. In all of these respects, this case presents a classic example of why courts should not decide issues without first providing litigants a full, fair and meaningful opportunity to be heard.

Once the deck is cleared of the misconceptions discussed above, there should be no doubt that the Tribe has a cause of action to enforce section 2. All four *Cort v. Ash* factors are satisfied. The Crow Tribe and its members are the especial beneficiaries of the statute. Congress intended to create a private cause of action to enforce the acreage limitation. The Tribe's suit furthers the legislative purpose and is appropriate for resolution by a federal court. The petition for certiorari should be granted to consider the cause of action issue based on proper understandings of the relationship between an Indian tribe and its members and of the broad range of remedies potentially available to redress violations of section 2.

c. The Court of Appeals carefully noted that it was not deciding the potential right of the United States to sue to invalidate illegal conveyances under section 2. App. 7 n.2. Under 28 U.S.C. § 1362, however, suits brought by Indian tribes are treated in certain respects as if the United States were the plaintiff. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. at 472-475. Therefore, under *Moe*, before dismissing the action the lower court

was required to determine whether the United States could sue to enforce section 2, and, if so, whether the Tribe stands in the shoes of the United States pursuant to section 1362. By not addressing this potentially dispositive issue, the decision below also conflicts with *Moe*.

3. The Court Of Appeals' Analysis Of The Cause Of Action Issue Conflicts With The Decisions Of Other Circuits.

As previously noted, the Court of Appeals acknowledged that section 2 was enacted for the especial benefit of Crow Tribal members and that tribal members have a right to sue to invalidate conveyances to ineligible purchasers. The result of that analysis should have been that the Tribe, as the representative of its members and the governing body of the Crow Reservation, also has a cause of action under section 2. Before reaching that seemingly inescapable conclusion, however, the Court of Appeals took a detour by conducting a search for specific evidence that Congress intended to vest a cause of action in a particular plaintiff, i.e., the Tribe. To the best of the Tribe's knowledge, this aspect of the Court of Appeals decision is unique and conflicts with the analytical approach to the cause of action issue in the decisions of all other federal appellate courts.

First of all, the only authority cited by the Court of Appeals, *California v. Sierra Club*, 451 U.S. 287, 294 (1981), App. 9, is inapposite. In that case, this Court held that the statute at issue was intended to benefit the public at large

as opposed to any particular people. No especial beneficiaries of the statute were identified, so there was no occasion to constrict the class in manner in any way comparable to the circuit court's hairsplitting and artificial distinction between Crow tribal members and the Crow Tribe.

No other court has even considered fashioning so fine a distinction between two such closely related parties as the Crow Tribe and its members in determining whether a plaintiff has a cause of action. To the contrary, the lower federal courts have recognized that Congress rarely identifies the specific beneficiaries of its laws, *American Telephone & Telegraph Co. v. M/V Cape Fear*, 967 F.2d 864, 870 (3d Cir. 1992), and that, "properly conducted," the kind of inquiry undertaken in *California v. Sierra Club* "weeds out statutes which protect a general public interest and only incidentally create advantages for particular people," *Sterling Suffolk Racecourse Ltd. Partnership v. Barrellville Racing Ass'n., Inc.*, 989 F.2d 1266, 1269 (1st Cir. 1993). Since the Court of Appeals correctly found that section 2 was intended to protect particular people, i.e., Crow tribal members, the analysis of the first *Cort v. Ash* factor should have ended with the observation that the Crow Tribe is suing as the representative of its members followed by a citation to *Puyallup Tribe v. Washington Game Department.*

The Court of Appeals clearly erred in conducting a search for specific evidence that Congress intended to benefit the Tribe *qua* Tribe as opposed to the members of the Tribe. There is simply no authority or justification for that kind of investigation which would impose burdens that Congress could not possibly meet. Rather, as illustrated by *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d

701, 705 (1st Cir. 1977), courts should analyze the purpose, logic and structure of a statutory provision to determine the relationship between the plaintiff and the benefits bestowed by the statute and whether a suit by the plaintiff would vindicate the policies promoted by law. [13] In the case at bar, there is no doubt that the Tribe's action would carry out Congress's policy of protecting tribal members who own land within the Crow Reservation from undue pressure and exploitation from large landowners.

The Tribe's petition for certiorari should be granted to correct lower court's unique departure from established precedent in its analysis of the first *Cort v. Ash* factor and to avoid unnecessary confusion in this important and frequently reoccurring area of law.

CONCLUSION

The Tribe was denied a full, fair, and meaningful opportunity to be heard on the issue decided by the Court of Appeals. This Court should grant the Tribe's petition and either summarily reverse to provide that opportunity or set the case for full briefing and argument to consider the issues and conflicts raised by the lower

[13] In Comtronics, the Court of Appeals held that suppliers of certain equipment have a right of action to enforce a law intended to protect consumers of telephone services because the consumers and suppliers have an identity of interest and the suit by the suppliers would vindicate the consumers' interests. Identical considerations apply to the relationship between the Crow Tribe and its members in the context of Section 2.

court's unfortunate and unjust rush to judgment without benefit of the parties' views on the dispositive issue.

Respectfully submitted,

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